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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PAUL KOLLING et al.

Plaintiffs and Respondents,

v.

PAUL J. MITTERBACH et al.,

Defendants and Appellants.

A141244

(Sonoma County  
Super. Ct. No. SCV 233230)

Respondents Paul and Kendra Kolling and appellants Paul and Constance Mitterbach entered into an agreement in 2005 to ensure that the Kollings had access to their landlocked property. In the agreement, the Mitterbachs granted the Kollings the right to cross “the existing road” on the Mitterbachs’ property, and, in exchange, the Kollings agreed to deed certain real property to the Mitterbachs. By 2013, the agreement had yet to be fully carried out, and the parties filed cross-motions to compel performance. The trial court granted both motions. It ordered the Kollings to record a quitclaim deed, and it ordered the Mitterbachs to record an easement deed containing a legal description of the existing road. In this appeal, the Mitterbachs contend that the trial court erred in requiring the inclusion of the legal description in the easement deed. We affirm.

**BACKGROUND**

In September 2005, the Mitterbachs, the Kollings, and Mary Murphy, a nonparty in this appeal, entered into a settlement agreement concerning three parcels of property owned by the Kollings known as Spring Lot One, Spring Lot Two, and the Bottling House Lot. The agreement required (1) the Kollings to quitclaim Spring Lot One to

Murphy in return for certain water and easement rights, (2) the Kollings to quitclaim Spring Lot Two to the Mitterbachs; (3) the Mitterbachs and the Kollings to exchange portions of existing parcels through a lot line adjustment; and (4) the Mitterbachs to grant the Kollings “the right to use the existing road from the Bottling House Lot . . . to and from Pine Mountain Road, a public way.” The “existing road” referenced in the agreement is commonly known as “Circle D Road.” The agreement was contingent upon the approval of the lot line adjustment, and it contained an integration clause requiring the parties to “execute all such documents as may be required to carry out the intent” of the agreement.

After the lot line adjustment was finalized in March 2013, the Mitterbachs demanded the Kollings to quitclaim Spring Lot Two as required by the agreement. The Kollings failed to comply promptly, and the Mitterbachs filed a motion to enforce the agreement. In response, the Kollings filed their own motion to enforce the agreement. They sought an order requiring the easement deed, which the Mitterbachs had already filed, to include a legal description of Circle D Road. As filed, the easement included no such description and simply granted the Kollings an easement over “the existing road located on Grantor’s property . . . .” The Mitterbachs objected to the Kollings’ motion, contending that it was an attempt to rewrite the agreement. They did not, however, provide any evidence to dispute the accuracy of the Kollings’ legal description of Circle D Road.

The trial court granted both motions. It required the Kollings to execute and record a quitclaim to Spring Lot Two, and it required the Mitterbachs to execute and record an easement deed in the form proposed by the Kollings. In explaining its ruling on the Kollings’ motion, the court cited real estate law practice guides and stated: “An agreement providing for an easement is an agreement to properly provide for an easement, especially considering the implied covenant of good faith and fair dealing. The proper way to record an easement is to include a legal description—this is not reasonably disputed.”

## DISCUSSION

On appeal, the Mitterbachs contend that the trial court erred in requiring the inclusion of a legal description of the road in the easement because the agreement required them only grant the Kollings an easement over “the existing road.” We reject the argument for the same reason cited by the trial court: the inclusion of the legal description in the easement imparts appropriate certainty and clarity and is in no way inconsistent with the agreement.

In interpreting a settlement agreement, we apply the ordinary rules of contract interpretation. (*Belasco v. Wells* (2015) 234 Cal.App.4th 409, 420.) “ ‘Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation.’ ” (*Hartford Casualty Insurance Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288.) “ ‘The mutual intention to which the courts give effect is determined by objective manifestations of the parties’ intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties.’ ” (*Tribeca Companies, LLC v. First American Title Insurance Co.* (2015) 239 Cal.App.4th 1088, 1111.) “When the trial court’s construction of a written agreement is challenged on appeal . . . and no extrinsic evidence is necessary to resolve any ambiguity or uncertainty, interpretation of the contract is subject to de novo review.” (*In re Marriage of Lafkas* (2015) 237 Cal.App.4th 921, 932.)

The agreement states that “Mitterbach hereby grants Kolling the right to use the existing road from the Bottling House Lot for ingress and egress to and from Pine Mountain Road, a public way.” Although the agreement does not expressly refer to an easement, the right it establishes—the ability of the Kollings to “use the existing road” across the Mitterbachs’ property—is in the nature of an easement, which is defined as “ ‘a restricted right to specific, limited, definable use or activity upon another’s property, which right must be *less* than the right of ownership.’ ” (*Schmidt v. Bank of America* (2014) 223 Cal.App.4th 1489, 1499, original italics.) Passage across the property of

another is a common form of easement right. (*Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 703.) The parties do not dispute that the agreement manifests an intent by the Mitterbachs to grant an easement to the Kollings for passage across the Mitterbachs' property over Circle D Road.

The agreement further requires the Mitterbachs to “execute all such documents as may be required to carry out” the commitments made in the agreement. Thus, the only issue in this appeal is the appropriate form for documenting the easement. As noted by the trial court, commentators regard the inclusion of a legal description of the location of the easement as the best practice in drafting easement deeds. (See, e.g., Miller & Starr, 6 Cal. Real Estate (3d ed. 2011) § 15.15, pp. 15-65–15-66.) “[A]n easement consisting of a right of way must contain a description of the land which is to be subjected to the servitude with sufficient clearness to locate it.” (*Pacific Gas & Electric Co. v. Crockett Land and Cattle Co.* (1924) 70 Cal.App. 283, 293; see also *City of Glendora v. Faus* (1957) 148 Cal.App.2d 920, 926 [“In order to grant an easement it is necessary to describe both the land to be subjected to a use and the use to which the land is to be subjected”].)

The description contained in the original easement filed by the Mitterbachs, which refers to “the existing road,” may be legally adequate but it is far from precise because it includes no objective specification of the easement’s location. Someone seeking to confirm the validity of the easement would be required to visit the property to determine that a road (and only one road) exists and to map its location. And even then, the description is accurate only so long as the location of the road does not change. Should the present road be changed or eliminated, the resulting difficulty in identifying the location of the easement could place its validity at risk and invite further disputes. (See *Tucker v. Watkins* (1967) 251 Cal.App.2d 327, 332-333 [claimant would have difficulty proving easement with “sufficient specificity” because public road over which easement was claimed had been washed away].)

The Mitterbachs’ promise under the agreement to “execute all such documents as may be required” necessarily anticipates that the executed documents will be properly

completed to serve the purpose of the agreement. Requiring the easement deed to include a legal description is not inconsistent with the agreement because it ensures that the easement is properly completed. The Mitterbachs argue that the trial court's order "created new terms" because the agreement granted the Kollings "only . . . the right to use the existing road." Similarly, they argue that the trial court "impermissibly expand[ed] the scope" of the easement. But we can discern no substantive difference between a grant of "the right to use the existing road" and a grant of the right to use the same road with a reference to its legal description. We fail to perceive, and the Mitterbachs fail to explain, how the inclusion of a legal description of the location of the easement is either inconsistent with the agreement or an expansion of the easement's scope.<sup>1</sup> The Mitterbachs are arguing a distinction without a difference, and we can find no basis in the argument for disturbing the trial court's ruling.

The Mitterbachs cite *Hannah v. Pogue* (1944) 23 Cal.2d 849 and *Whalen v. Ruiz* (1953) 40 Cal.2d 294 in support of their argument, but both cases are readily distinguished. In *Hannah*, the defendant, who had acquired an easement by prescription to dam and divert water on the plaintiff's land, attempted to change the location of the dam. (*Id.* at p. 852.) The court found that the prescriptive easement was restricted to the spot on the plaintiff's land on which the dam had historically been located. (*Id.* at p. 855.) *Hannah* is of no help to the Mitterbachs because the Kollings have not attempted to change the location of the easement, but have merely sought to specify its legal description. *Whalen* is also of no help to the Mitterbachs. In that case, a railroad had granted to two counties an easement to use the upper portion of a bridge for automobile traffic. The Supreme Court concluded that the railroad's obligation in the easement agreement to "keep in repair, operate and police" the bridge did not include the duty to make structural improvements to the bridge to handle increased automobile traffic. (*Id.* at pp. 299, 300.) Unlike in *Whalen*, no one here is attempting to expand the rights

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<sup>1</sup> For the same reason, we reject the Mitterbachs' contention that the trial court's order gave the Kollings a "better deal." Because the trial court's order did not change the use right granted in the agreement, it merely implemented the deal already struck.

granted in the easement; the Kollings simply sought, and the trial court ordered, that the legal description of the location of the easement be specified.

In their reply brief and at oral argument, the Mitterbachs argued that the Kollings failed to demonstrate that the description included in their proposed easement deed was an accurate description of the location of Circle D Road. But this argument was forfeited because it was raised for the first time on appeal and, further, in reply. (*People v. Grimes* (2015) 60 Cal.4th 729, 757 [arguments raised for the first time in appellate reply brief are ordinarily forfeited]; *Simplon Ballpark, LLC v. Scull* (2015) 235 Cal.App.4th 660, 669-670 [“ ‘a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court’ and ‘[g]enerally, issues raised for the first time on appeal which were not litigated in the trial court are waived’ ”].) A finding of forfeiture is particularly appropriate here. The legal description was prepared by a licensed surveyor, a fact established by admissible evidence in the Kollings’ submissions below. Had the Mitterbachs raised the issue in a timely manner, the Kollings presumably could have cured the alleged deficiency merely by submitting a declaration from the surveyor confirming the competence of his work. Because the Mitterbachs’ opposition to the Kollings’ motion to enforce the settlement agreement in the trial court did not mention this issue, the Kollings had no reason or opportunity to cure.<sup>2</sup> Under these circumstances, it would be unfair to permit the Mitterbachs to raise the issue for the first time in this court.

The Mitterbachs finally argue the trial court violated the parole-evidence rule in considering explanatory evidence submitted by the Kollings. We need not address this contention because we do not rely on that evidence in reaching our disposition.

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<sup>2</sup> The Mitterbachs did submit objections to various aspects of the Kollings’ evidentiary submissions, but these objections were merely to the admissibility of various statements. Nowhere in their memorandum of points and authorities or their objections did the Mitterbachs argue that the Kollings failed to prove the accuracy of the legal description. While it is possible this issue was raised at argument below, the Mitterbachs did not include a transcript of the argument in the appellate record.

## DISPOSITION

The judgment of the trial court is affirmed. The Kollings may recover their costs on appeal. (Cal. Rules of Court, rule 8.278, subds. (a)(1), (2).)

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Humes, P.J.

We concur:

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Margulies, J.

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Dondero, J.